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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NOAH AARON LEVINE,

Defendant and Appellant.

A140838

(Marin County  
Super. Ct. No. SC163774)

In 2009, Noah Aaron Levine was charged with several drug-related crimes, including the cultivation of marijuana. Levine pleaded guilty to a count of maintaining a place for selling or using controlled substances and the remaining counts were dismissed with *Harvey* waivers.<sup>1</sup> Levine was placed on probation and ordered to pay restitution to Joshua Rafner, who had leased to Levine the property on which Levine committed the charged offenses.

Rafner requested restitution of \$51,306.32 in out-of-pocket expenses he incurred to repair damage to his property caused by Levine. He also requested compensation, without specifying a dollar amount, for 208.75 hours of personal time he had spent in tasks associated with evicting Levine and repairing damage. The probation officer who prepared a restitution memorandum for the court regarded the time Rafner had lost as

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<sup>1</sup> Under *People v. Harvey* (1979) 25 Cal.3d 754, the facts of charges dismissed in a plea bargain may not be used for purposes of aggravating or enhancing a defendant's sentence "in the absence of any contrary agreement." (*Id.* at p. 758.) A *Harvey* waiver allows the trial court to consider the facts of dismissed counts in sentencing.

representing lost wages. Based on a 2006 invoice showing that Rafner had billed an unidentified third-party at a rate of \$400 per hour for services as an expert witness and \$200 per hour for services as a corporate finance analyst, the probation officer valued Rafner's lost time at \$80,100. Following a restitution hearing, the trial court accepted the probation officer's calculations and ordered Levine to make restitution to Rafner in the amount of \$131,406.32, plus 10 percent interest from March 11, 2009.

On appeal, Levine challenges the trial court's valuation of Rafner's lost time, arguing that there is no factual basis for the probation officer's valuation that the court adopted. Because there was no evidence that the time Rafner spent dealing with the damage caused by Levine was time he would otherwise have worked, we agree that the trial court abused its discretion in ordering Rafner to pay \$80,100 for Rafner's loss of time. Accordingly, we reverse the court's order setting the amount of restitution and remand for further proceedings.

Levine also contends that there was no factual basis for determining that most of the out-of-pocket expenses Rafner incurred were to fix damage that was the result of his criminal activity. We disagree. On remand the trial court shall reinstate the portion of its prior restitution order related to Rafner's out-of-pocket expenses.

## **BACKGROUND**

### ***I. Procedural Background***

On July 9, 2009, the People filed an information charging Levine and a co-defendant, Letitia Ann Lu, with five counts: (1) cultivating marijuana (Health & Saf. Code, § 11358); (2) possession of marijuana for sale (*id.*, § 11359); (3) possession of hydrocodone (*id.*, § 11350, subd. (a)); (4) possession of cocaine (*id.*, § 11350, subd. (a)); and (5) misdemeanor possession of anabolic steroids (*id.*, § 11377, subd. (b)). The information alleged that Levine was armed with a firearm in the commission of counts 1 through 4. (Pen. Code, § 12022, subd. (a)(1).)

On January 20, 2011, the People filed an amended information adding a sixth count: maintaining a place for selling or using a controlled substance (marijuana) (Health

& Saf. Code, § 11366). Levine pleaded guilty to count 6 and the remaining counts were dismissed with *Harvey* waivers.

On March 9, 2011, the court suspended imposition of sentence and placed Levine on probation for three years, with 29 days in county jail, fees and fines.

On April 7, 2011, the court modified Levine's conditions of probation, adding a requirement to pay restitution to his former landlord, Joshua Rafner, "in an amount and manner to be determined by the probation officer, subject to court review upon [Levine's] timely objection."

The court held a restitution hearing on December 9, 2013, and ordered Levine to pay restitution to Rafner in the amount of \$131,406.32, plus 10 percent interest from March 11, 2009 (the date of the offense).

Levine timely filed a notice of appeal on January 21, 2014.

## **II. *Factual Background***<sup>2</sup>

Levine rented the premises at 325 Ralston Avenue in Mill Valley, California (the property) from Rafner on December 1, 2004. On the property were three structures: a house, a garage, and a large shed.<sup>3</sup>

On February 25, 2009, Officer Mario Medeiros went to the property to serve a subpoena. While on the property, he smelled marijuana and observed materials often used in marijuana growing operations. On March 10, 2009, Detective Michael Brovelli executed a search warrant at the property. The police found marijuana plants, processed marijuana and other controlled substances.

Following Levine's conviction, Marin County Probation Officer Kathleen Paulsen was assigned to determine an appropriate restitution amount. On June 9, 2011, Rafner faxed to the probation office a restitution claim form, noting that he had expended about 200 hours of "personal time for repairs, eviction" in addition to out-of-pocket expenses.

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<sup>2</sup> The background facts are taken from testimony at the preliminary hearing, testimony at the restitution hearing, and documents submitted for the restitution hearing.

<sup>3</sup> Levine "hailed" the shed onto the property and abandoned it there when he vacated the premises.

Rafner provided receipts for his expenses, a log of the time he devoted to the matter, and a personal statement about the damage to the property.

Rafner stated that Levine had cut holes through the outside walls of the house for improvised ductwork. He had cut through interior walls to accommodate “roughed in heavy electrical wiring.” The garage was “reconstructed as a grow-room” and the car door was sealed shut. Levine punched holes through the roof of the garage for venting. A fire in the garage had blackened the sheetrock and “the place stank.” Windows were broken. Crawlspace vents “were hacked open to run electrical lines, allowing vermin in. Toilets were clogged with debris, plumbing fixtures damaged, light switches broken.”

On August 23, 2011, the probation office submitted a memorandum on restitution to the court. The memorandum consisted of a spreadsheet detailing \$51,306.32 in expenses incurred by Rafner along with supporting receipts, Rafner’s personal statement, and other supporting documents. The spreadsheet noted that Rafner’s “[e]stimated time loss for repairs, eviction per victim[’]s log is 208.75 hours.” The claim for Rafner’s time was supported by Rafner’s time log, a separate spreadsheet detailing specific tasks that Rafner had undertaken along with the date of each task and the amount of time spent on each task. Paulson’s memorandum did not assign a valuation to Rafner’s lost time.

At the restitution hearing, Paulsen placed a value of \$80,100 on Rafner’s time. Paulsen stated that “his time was considered lost wages.”

## **DISCUSSION**

Penal Code section 1202.4, subdivision (a)(3)(B) requires a trial court to order the defendant to pay “[r]estitution to the victim or victims, if any, in accordance with subdivision (f).” Subdivision (f) provides, in relevant part: “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it

finds compelling and extraordinary reasons for not doing so and states them on the record.” Subdivision (f)(3) provides that the restitution ordered “shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct . . . .” Subdivisions (f)(3)(A) through (f)(3)(K) identify, without limitation, examples of economic losses that are recoverable by the victim, including losses to property and “wages or profits lost” due to injury or time spent as a witness or assisting the police or prosecution.

A defendant is entitled to a restitution hearing to “dispute the determination of the amount of restitution.” (Pen. Code 1202.4, subd. (f)(1).) “At a victim restitution hearing, a prima facie case for restitution is made by the People based on a victim’s testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] ‘Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.’ ” (*People v. Millard* (2009) 175 Cal.App.4th 7, 26 (*Millard*).)

We review a trial court’s restitution order for abuse of discretion. (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1173 (*Chappelone*).) “When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.” (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562.) “However, a restitution order ‘resting upon a “ ‘demonstrable error of law’ ” constitutes an abuse of the court’s discretion. [Citation.]’ [Citation.] ‘In reviewing the sufficiency of the evidence [to support a factual finding], the “ ‘power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted.’ to support the trial court’s findings.” ’ ” (*Millard, supra*, 175 Cal.App.4th at p. 26.)

“A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall. [Citations.] While the court need not order restitution in the precise amount of loss, it ‘must use a rational method that could

reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ ” (*Chappelone, supra*, 183 Cal.App.4th at pp. 1172-1173.)

Levine contends that the trial court abused its discretion both in awarding \$80,100 for Rafner’s loss of time and in awarding \$51,306.32 for Rafner’s out-of-pocket expenses. We examine each contention separately.

***I. The Trial Court Abused Its Discretion In Ordering Restitution In The Amount Of \$80,100 For Rafner’s Loss Of Time.***

Paulsen placed a value of \$80,100 on Rafner’s time loss at the restitution hearing. She stated that “his time was considered lost wages.” Rafner had submitted to the probation department a 2006 invoice billing an unidentified third-party for 140.5 hours of work as an expert witness (at \$400 per hour) and five hours of work as a corporate finance analyst (at \$200 per hour). Based on this invoice, Paulsen calculated the 208.75 hours of Rafner’s time as representing \$80,100 in lost wages, valuing some hours (apparently 196.75) at \$400 per hour and the remaining hours (apparently 12) at \$200 per hour.

The tasks that consumed 208.75 hours of Rafner’s time included communicating or meeting with Levine, the police, the deputy district attorney, his attorney, his insurance provider and contractors; research concerning requirements to evict a tenant; providing eviction notice to Levine; inspection of the property; purchase of materials for repairs; clean up of the property; and preparation of and communications about his claim for restitution. Levine contends that there was insufficient “evidence to support awarding such a high hourly rate for time spent arranging repairs, coming to court, or other services which did not involve being an expert witness or a corporate finance analyst.” We agree.

Nowhere in his submissions to the probation department did Rafner claim that any of the 208.75 hours for which he sought reimbursement were hours he would have otherwise spent earning wages or professional fees. Rafner referred to the time he spent as “personal time” and time he “couldn’t spend with [his] young children,” not time that

he missed working.<sup>4</sup> There was no factual basis for Paulsen or the trial court to regard Rafner's time as representing lost wages or fees,<sup>5</sup> and professional fees Rafner charged on one occasion in the past did not provide substantial evidence of the value of his time.

For these reasons, the trial court abused its discretion in ordering restitution of \$80,100 for Rafner's loss of time. Accordingly, we reverse the court's restitution order to the extent it reimbursed Rafner for his lost time and remand for further proceedings.<sup>6</sup> On remand, the trial court must consider whether there is a method for valuing Rafner's time that is not based on his earnings, because the record is devoid of evidence that Rafner in fact lost any earnings.

## ***II. The Court Did Not Abuse Its Discretion In Ordering Restitution Of \$51,306.32 For Rafner's Out-Of-Pocket Expenses.***

Levine contends that we must reduce the portion of the restitution amount related to Rafner's out-of-pocket expenses because work that Rafner's hired contractors performed "went beyond the damage caused by appellant's offense." Specifically, he challenges Rafner's out-of-pocket expenses for painting, refinishing floors, landscaping and purchased materials. We find no merit to Levine's arguments. On remand, the trial

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<sup>4</sup> Levine does not question that a loss of time that does not result in lost wages or profits is an economic loss that is reimbursable pursuant to Penal Code section 1202.4. Accordingly, we express no opinion on the matter.

<sup>5</sup> Even if Rafner had incurred lost wages or fees, a one-time invoice to an unidentified third-party in 2006, does not provide substantial evidence of the amount of Rafner's economic loss. There is no evidence in the record concerning Rafner's usual occupation or his average weekly or monthly earnings during the period in question. One method of determining such a loss can be derived from Penal Code section 1202.4, subd. (f)(3)(D) concerning the loss of commission income, which "shall be established by evidence of commission income during the 12-month period prior to the date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown."

<sup>6</sup> When a trial court has erred in calculating the amount of restitution owed and the record does not provide a basis for determining a correct amount of restitution, we remand to the trial court for further proceedings. (See, e.g., *Millard, supra*, 175 Cal.App.4th at pp. 30-34; *Chappelone, supra*, 183 Cal.App.4th at p. 1185.)

court shall reinstate that portion of its prior restitution order related to Rafner's out-of-pocket expenses.

#### **A. *Painting***

Rafner requested restitution of \$6,800 he paid to painting contractor Clark Chelsey. Chelsey testified at the restitution hearing that he painted the interior of the house and the garage. Chelsey recalled that the garage had fire damage that was "rather dramatic" and estimated that work on the garage amounted to \$1,000 to \$1,250 of the total amount charged. Chelsey did not recall "anything exceptional" from the interior of the house, which was dirty and "had scuff marks."

Levine contends that there was insufficient evidence to establish that Chelsey's painting of the interior of the house was attributable to Levine's cultivation of marijuana. We disagree. Rafner's personal statement specified extensive damage to the house and not just to the garage: "Holes were cut through the outside walls of the house for improvised ductwork. Inside walls were sawed through to accommodate roughed in heavy electrical wiring." Earl Gilson, a contractor, testified at the restitution hearing that there were holes in the sheetrock on the lower level and broken sheetrock upstairs that needed replacement. Rafner's statement and Gilson's testimony reasonably support the conclusion that repairs to walls of the house were required because of Levine's marijuana cultivation, and that the walls needed to be painted after repair. The People made a prima facie showing for restitution of Rafner's painting expenses, and Levine failed to satisfy his burden of showing that the loss was caused by something other than his use of the house to grow marijuana and sell drugs or that the cost of these repairs was other than the amount stated by Rafner. The court did not abuse its discretion by including all of the painting expense in the restitution order.

#### **B. *Wood Floor Refinishing***

Rafner requested restitution of \$2,300 he paid Mark Ciddo Woodwork for the refinishing of wood floors. Gilson testified that the damage to the house that required repair exceeded normal wear and tear and that floors of the house were dirty because "[t]hings were being grown inside of the building." This testimony reasonably supports



the conclusion that the floors required refinishing because of Levine's marijuana cultivation on the property. Levine presented no evidence to the contrary. The court did not abuse its discretion by including the wood floor refinishing in the restitution order.

### ***C. Landscaping***

Rafner requested restitution of \$4,862 he paid to Armando Rodriguez Professional Landscape Service. Most of the work that Rodriguez performed had to do with removing acacia trees and scotch broom from the yard of the property, which was about an acre in size. Rodriguez also had to remove "a lot of debris" from the yard, including a quantity of PVC pipe, used for irrigation. The PVC irrigation lines that Rodriguez removed had been extensions to the original irrigation system.

Rafner's statement to the probation department included the following: "Outside, a garden we had tended for most weekends for a decade was ravaged by weed acacias ten and twenty feet tall that had been allowed to grow to conceal pot farming on the hill behind the house. Heritage redwoods had been cut down to open more planting area. My hand-built irrigation system was destroyed."

Rodriguez's testimony and Rafner's statement comprise a prima facie showing that the landscaping work was required as a result of Levine's marijuana cultivation operation. Weeds were allowed to grow to conceal marijuana cultivation and the irrigation system was damaged by extensions to the system that (by reasonable inference) were made to support marijuana cultivation. Levine presented no evidence to the contrary, and the court did not abuse its discretion in ordering restitution for the landscaping work.

### ***D. Materials Purchases***

Levine's argument as to items purchased by Rafner is as follows: "Mr. Rafner also claimed materials totaling \$10,495.21, in addition to the contractors' bills which also included at least some of the materials for which receipts were submitted. [Citations.] There was simply no testimony linking these receipts to any damage caused by the marijuana offense. They include lights, lamps, tile, smoke detectors, door mats, plants

and seeds, and other miscellaneous and illegible items. There was no evidence that appellant was responsible for Rafner purchasing these things.”

Levine had ample opportunity to challenge the legitimacy of any of Rafner’s claimed purchases at the time of the restitution hearing, and he failed to do so. Accordingly, the issue is waived. (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.)

### **DISPOSITION**

The trial court’s December 9, 2013 order setting the amount of restitution is reversed to the extent it awarded restitution for Rafner’s lost time. The matter is remanded for further proceedings consistent with this opinion.

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STEWART, J.

We concur.

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KLINE, P.J.

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RICHMAN, J.